**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 51**

Docket No. DC-0752-08-0410-I-1

**Melissa A. Adde,**

**Appellant,**

**v.**

**Department of Health and Human Services,**

**Agency.**

April 7, 2009

Nicholas Woodfield, Esquire, Employment Law Group, P.C., Washington, D.C., for the appellant.

Marilyn Blandford, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

## OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued July 10, 2008, that dismissed the appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision and REMAND the appeal for further adjudication.

## BACKGROUND

¶2 Beginning in February 1988, the appellant served as a GN-610-11 Nurse, at the National Institutes of Health in Bethesda, Maryland, and was paid a special salary pursuant to 5 U.S.C. chapter 53, which authorized special pay rates to overcome recruitment difficulties under specified circumstances. Appeal File, Tab 5, subtabs 4c, 4l, 4n. On October 9, 1988, the agency adjusted the appellant's pay to a special supplemental salary rate on the N01 special salary table in accordance with title 38 of the United States Code and delegated authority from the Office of Personnel Management (OPM) to implement the title 38 special salary rate. Appeal File, Tab 1, Attachment 4; Tab 5, subtab 4k; Tab 9, Exhibits A, E. The title 38 special salary rates were similarly intended to overcome recruitment difficulties for certain health care professionals. Appeal File, Tab 1, Attachments 3, 4; Tab 5, subtab 4k; Tab 9, Exhibits A, E. The agency promoted the appellant to the GN-13 level in 1999. Appeal File, Tab 5, subtab 1 at 6; Tab 5, subtab 4n.

¶3 The appellant's duty station changed from Bethesda to Brussels, Belgium, effective April 19, 2000. Appeal File, Tab 5, subtabs 4l, 4m. At that time, the appellant was a GN-610-13, Step 7, Nurse, under the special supplemental salary rate, and she continued to receive the supplemental salary rate for several years after relocating to Belgium. Appeal File, Tab 1, Attachment 3 at 1-2; Tab 5, subtabs 4l, 4m; Tab 9 at 5-6 of 45.

¶4 The agency eventually determined that it had been overpaying the appellant following her transfer to Belgium because the appellant should not have continued to receive the N01 supplemental salary rate, which is only applicable to the Washington, D.C. metropolitan area, and because OPM had directed the elimination of grades 13-15 on the N01 salary table in 2006. Appeal File, Tab 5, subtabs 4b, 4e, 4h, 4i, 4l, 4m. The agency and the appellant then attempted to resolve the pay issues, including the question of whether the appellant was required to repay her alleged salary overpayment, and their disagreement

eventually resulted in litigation that did not resolve the issues in this appeal. Appeal File, Tab 1, Attachments 3, 4; Tab 5, subtab 1 at 1 n.1, 4 n.3; Tab 9 at 6-7 of 45.

¶5 In February 2008, the agency informed the appellant that it would adjust her salary to correct the longstanding error of paying her in accordance with the supplemental N01 salary table rate after she transferred to Belgium, that it could no longer leave the appellant in a non-existent grade (grades 13-15 had been eliminated from the N01 salary table in 2006), and that she was not eligible for pay retention. Appeal File, Tab 5, subtab 4e. The agency, therefore, determined that it would set the appellant's salary using the highest previous rate rules in accordance with 5 C.F.R. § 530.323(c). *Id*.

¶6 The appellant ultimately filed an appeal alleging that the agency improperly reduced her pay and failed to provide her with required pay retention. Appeal File, Tab 1. The agency moved that the appeal be dismissed for lack of jurisdiction. Appeal File, Tab 5, subtab 1. The administrative judge then directed the appellant to respond to the specific arguments in the agency's motion and to submit evidence and argument showing Board jurisdiction. Appeal File, Tab 6.

¶7 Following submissions from both parties, the administrative judge dismissed the appeal for lack of jurisdiction, finding as follows: (1) A reduction in an employee's rate of basic pay is generally appealable to the Board; (2) rate of basic pay means the rate of pay fixed by law, before any deductions and exclusive of additional pay of any kind; (3) a reduction in pay from a rate that is contrary to law or regulation, however, is not appealable; (4) 5 C.F.R. § 530.309(d) states that the reduction or termination of an employee's special salary rate supplement is not an adverse action, and both Board and court precedent have found that the reduction or termination of additional pay is not within the Board's jurisdiction; (5) because the agency set the appellant's pay rate contrary to law at the time it reassigned her to Belgium, its termination of

that erroneous supplemental special rate is not within the Board's jurisdiction; and (6) the Board also lacked jurisdiction over the agency's decision to deny pay retention. Appeal File, Tab 13.

¶8 In her petition for review, the appellant asserts that the administrative judge erred in weighing evidence and resolving disputed facts in favor of the agency, in dismissing the appeal for lack of jurisdiction without holding a hearing. Petition for Review File, Tab 1 at 10-11 of 27. Specifically, the appellant argues that the administrative judge accepted the agency's version of the facts regarding both the nature of her transfer to Belgium and the agency's discovery of the alleged pay error. The appellant asserts that, instead, the administrative judge should have accepted her claim that she did not request her transfer to Belgium, that the agency transferred her there in the interest of the government, and that the reduction in pay was, therefore, not at her request under 5 C.F.R. § 536.103. *Id*. at 7-13 of 27. The appellant further argues that the administrative judge should have accepted her evidence, showing that the agency specifically intended to pay her at the same pay rate she received in Bethesda. *Id*. at 13-15 of 27. Finally, the appellant asserts that the administrative judge committed legal error in interpreting the statutes and regulations governing whether a reduction in pay is appealable to the Board, in concluding that the Board lacks jurisdiction over the agency's decision to deny pay retention, and in finding that the agency reasonably and consistently interpreted its regulations and policies when it changed the appellant's salary rate. *Id*. at 15-25 of 27.[*]

[*] The appellant also filed an untimely reply to the agency's response to her petition for review, and the agency moved to strike this submission. Petition for Review File, Tabs 2, 4-5. The Board will not consider the appellant's untimely filing because she did not show that the substance of the submission was not readily available before the record closed. 5 C.F.R. § 1201.114(i).

## ANALYSIS

¶9 We find that this appeal requires further adjudication to resolve the conflict between the definitions of "basic rate of pay" under 5 U.S.C. chapters 75 and 53. In reaching this conclusion, we note that the administrative judge found, without a hearing, that the Board does not have jurisdiction over the appellant's pay reduction claim because 5 C.F.R. § 752.401(b)(15) excepts from Board jurisdiction reductions in pay "from a rate that is contrary to law or regulation." Appeal File, Tab 13 at 7-8. In this regard, the administrative judge determined that the continued payment of the special pay rate after the appellant transferred to Brussels was contrary to law or regulation because agency internal regulations established that the special rate was intended to attract employees to work in the Washington, D.C. metropolitan area, and that the appellant was, therefore, not entitled to that rate during her overseas assignment. *Id*. at 8-9. The administrative judge also concluded that elimination of the special pay rate was not appealable under chapter 75 because 5 C.F.R. § 530.309(d) expressly provides that the reduction or termination of a special rate is not an adverse action under 5 C.F.R. part 752, subpart D, or an action under 5 C.F.R. § 930.211. *Id*. at 8.

¶10 The appellant, however, would be entitled to a jurisdictional hearing if she made a prima facie case that her "pay" was reduced within the meaning of 5 U.S.C. § 7512(4). *See Rice v. Merit Systems Protection Board*, 522 F.3d 1311, 1314 (Fed. Cir. 2008); *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). For purposes of chapter 75, "pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." 5 U.S.C. § 7511(a)(4). Chapter 75's implementing regulations further explain that "pay" means the "rate of pay before any deductions and exclusive of additional pay of any kind." 5 C.F.R. § 752.402(f) (emphasis added). Thus, a threshold question concerns whether the special pay rate established under chapter 53 by the agency, based upon delegated

authority from OPM to apply 38 U.S.C. § 7455 to nurses working in the Washington, D.C. metropolitan area, should be construed as a rate of basic pay under 5 U.S.C. § 7511(a)(4).

¶11 Support exists for the conclusion that the special pay rate at issue here is a basic rate of pay for purposes of chapter 53 and 38 U.S.C. § 7455. Specifically, 38 U.S.C. § 7455 authorizes "[i]ncreases in rates of basic pay" for grades in the General Schedule when deemed necessary to obtain or retain services of health care personnel. 5 U.S.C. § 5305 similarly authorizes "higher minimum rates of pay" to address recruitment difficulties. Moreover, OPM's current regulations implementing 5 U.S.C. §§ 5332, 5333, and 5334 include special rates of pay established under section 5305 within the definition of rate of basic pay. 5 C.F.R. § 531.203; *see generally Kile v. Department of the Air Force*, 104 M.S.P.R. 49, ¶¶ 3, 13 (2006) (OPM revised its regulatory definition of rate of basic pay in 2005 to implement the Federal Workforce Flexibility Act of 2004).

¶12 We note, however, that support also exists for the opposite conclusion -- that the special pay rate at issue is not a basic rate of pay for purposes of 5 U.S.C. § 5305. Section 5305 expressly distinguishes these "higher minimum rates of pay" from the "maximum rate of basic pay" for the grade or level, which may not be exceeded by more the 30 percent. Further, section 5305 also provides that:

> A rate determined under a schedule of special rates established under this section shall be considered to be part of basic pay for purposes of subchapter III of chapter 83, chapter 84, chapter 87, subchapter V of chapter 55, and section 5941, and for such other purposes as may be expressly provided by law or as the Office of Personnel Management may by regulation prescribe.

5 U.S.C. § 5305(j). The exclusion of chapter 75 from this list of purposes for which the special rates of pay established under section 5305 shall be considered "part of basic pay" suggests that the law was not intended to expand Board jurisdiction under chapter 75 to include the "additional pay" authorized under the section.

¶13 In any event, accepting the inclusion of special rates of pay within the definition of rate of basic pay under chapter 53 does not resolve the question of whether the same definition applies for purposes of chapter 75. Indeed, 5 C.F.R. § 752.402(f) defines the basic rate of pay under chapter 75 as "exclusive of additional pay of any kind."

¶14 We find that providing the parties with the opportunity to submit evidence and argument regarding whether the special rate of pay established under 5 U.S.C. § 5305 constitutes a basic rate of pay under chapter 75 is warranted. This approach is consistent with similar Board cases involving locality pay established under 5 U.S.C. § 5304. Specifically, in both *Kile*, 104 M.S.P.R. 49, and *Rawls v. Department of the Air Force*, 104 M.S.P.R. 62 (2006), the Board noted the "discrepancy" between 5 C.F.R. § 752.402(f), which defines pay as the basic rate of pay "exclusive of additional pay of any kind," and 5 C.F.R. § 531.203, which defines rate of pay to include, among other things, "a special rate" and "a locality rate." *Kile*, 104 M.S.P.R. 49, ¶ 14; *Rawls*, 104 M.S.P.R. 62, ¶ 14. Further, both cases concerned whether the Board had jurisdiction over a reduction in pay claim based upon the elimination of locality pay established under 5 U.S.C. § 5304 and 5 C.F.R. § 531, subpart F. The Board recognized that it had yet to determine the impact of OPM's new regulations regarding the interpretation of basic rate of pay for chapter 75 jurisdictional purposes and remanded the appeals to afford the parties the opportunity to address the regulatory provisions and to submit evidence and argument regarding which regulations governed the appeals. *Kile*, 104 M.S.P.R. 49, ¶ 14; *Rawls*, 104 M.S.P.R. 62, ¶ 14. This approach is similarly warranted here.

¶15 We also note, however, that the present case concerns an issue absent from *Kile* and *Rawls* -- whether the appeal should be dismissed under 5 C.F.R. § 530.309(d). This regulation provides that "[t]he reduction or termination of an employee's special rate supplement in accordance with the requirements of this subpart is not an adverse action under 5 C.F.R. part 752, subpart D." The

administrative judge concluded that this provision precluded Board jurisdiction. Appeal File, Tab 13 at 8-9. Resolving this issue, however, requires determining whether the agency terminated the appellant's special pay rate because OPM had eliminated that pay rate under 5 C.F.R. part 530, subpart C, or because the agency discovered that the appellant's retention of the rate after relocating to Brussels violated agency regulations. If the agency terminated the appellant's rate for this latter reason, rather than pursuant to 5 C.F.R. part 530, subpart C, then 5 C.F.R. § 530.309(d) would not apply. The record does not clearly resolve this issue because it indicates that the agency made the salary adjustment based upon both reasons. Appeal File, Tab 5, subtab 4e. Further adjudication is, therefore, warranted on this issue, as well.

## ORDER

¶16 Accordingly, we REMAND this appeal for further adjudication consistent with this Opinion and Order. On remand, the administrative judge should afford the parties the opportunity to submit evidence and argument and then resolve the discrepancy between 5 C.F.R. § 752.402(f) and 5 C.F.R. § 531.203. If the administrative judge determines that 5 C.F.R. § 752.402(f) governs the appeal, then the appellant's loss of the special rate of pay is not an appealable action and the administrative judge should dismiss the appeal for lack of jurisdiction. *Kile*, 104 M.S.P.R. 49, ¶ 15; *Rawls*, 104 M.S.P.R. 62, ¶ 15. If, however, the administrative judge determines that the definition of basic rate of pay at 5 C.F.R. § 531.203 applies, then she should hold a jurisdictional hearing to resolve

whether either the violation of law or regulation exception, or 5 C.F.R. § 530.309(d), still precludes Board jurisdiction under the circumstances of this case.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.